In re Pers. Restraint of Mattson
Dissent by Alexander, C.J.

No. 81324-8

ALEXANDER, C.J. (dissenting)—I dissent because, in my view, the majority errs in upholding the decision of the Department of Corrections (DOC) denying Mark Mattson's sixth plan for release to community custody. In my judgment DOC wrongly adhered to its policy directive, which provided in part that a release plan is insufficient in cases where DOC's expert concludes that the party submitting the plan meets the criteria for civil commitment.[1] DOC should have based its decision on a review of the merits of Mattson's plan, and for that reason, I would affirm the Court of Appeals' decision granting Mattson's personal restraint petition (PRP).

At the outset, it is important to observe that Mattson has never been adjudicated to be a sexually violent predator (SVP) pursuant to the requirements set forth in chapter

[1]The DOC policy directive stated in part: "For those cases where a forensic evaluation has been completed and an expert has concluded that the offender does meet the criteria for civil commitment as defined under RCW 71.09.020, no proposed community release plan will be deemed sufficiently safe to ensure community protection." Suppl. Br. of DOC, App. 4, at 2. As the majority observes, DOC has since amended this policy. Majority at 4 n.4.

71.09 RCW for a civil commitment.[2] A mere conclusion by a DOC psychiatrist that Mattson meets the definition of an SVP does not fulfill these requirements. Put simply, Mattson cannot be judged an SVP unless and until: the State files a petition alleging he is such a predator and states sufficient facts to support such allegation, a probable cause determination is made by a superior court judge, an evaluation is conducted, the matter is tried, and a trial judge or a jury finds beyond a reasonable doubt that Mattson is an SVP. RCW 71.09.030, .040, .050, .060.

In reaching my decision, I find myself in agreement with the reasoning articulated by the Court of Appeals in *In re Personal Restraint of Dutcher*, 114 Wn. App. 755, 60 P.3d 635 (2002), that RCW 9.94A.728(2)(c) and (d)[3] "compel[] DOC to require offenders to develop a release plan, and *requires DOC to base its community custody eligibility decisions on the merits of the release plan*." *Dutcher*, 114 Wn. App. at 762 (emphasis added).[4] These provisions state as follows:

> (c) The department shall, as part of its program for release to the

[2]RCW 71.09.020(18) defines a "'[s]exually violent predator'" as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility."

[3]RCW 9.94A.728 was amended by Laws of 2009, ch. 399 (effective August 1, 2009), Laws of 2009, ch. 441 (effective August 1, 2009), and Laws of 2009, ch. 455 (effective July 26, 2009). This opinion applies the former version of RCW 9.94A.728 as amended by Laws of 2007, ch. 483, § 304.

[4]In *Carver v. Lehman*, 558 F.3d 869 (9th Cir. 2009), both the majority opinion and the opinion concurring in the judgment recognized that subsections (2)(c) and (2)(d) of RCW 9.94A.728 mandate that DOC make an individualized determination based on the merits of the plan. *Carver*, 558 F.3d at 875 n.8 (quoting *Dutcher*, 114 Wn. App. at 762), 884 (quoting *Dutcher*, 114 Wn. App. at 762).

> community in lieu of earned release, require the offender to propose a release plan that includes an approved residence and living arrangement. . . . ;
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> (d) The department may deny transfer to community custody status . . . if the department determines an offender's release plan . . . may violate the conditions of the sentence or conditions of supervision, place the offender at risk to violate the conditions of the sentence, place the offender at risk to reoffend, or present a risk to victim safety or community safety.

RCW 9.94A.728(2). It seems clear from a plain reading of the foregoing that the legislature has not authorized DOC to reject an eligible offender's release plan simply because a DOC psychiatrist concludes that the offender meets the criteria for a civil commitment as defined under RCW 71.09.020. *Cf. Dutcher*, 114 Wn. App. at 765-66 ("The legislature has . . . not authorized any exemption from this process simply because [the End of Sentence Review Committee] believes the offender qualifies for a civil commitment hearing.").

The majority's contrary understanding of the applicable statute contravenes the well-settled principle of statutory construction that "[t]he Legislature 'does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment.'" *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 769, 10 P.3d 1034 (2000) (quoting *John H. Sellen Constr. Co. v. Dep't of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976)). The majority does not adhere to this principle, reading the statute in a way that renders virtually meaningless the language, quoted above, that directs DOC, as part of its program for release to the community, to require eligible offenders to propose release plans. *See* RCW

9.94A.728(2)(c). Under the majority's interpretation, an eligible offender's plan is merely a purposeless proposal that DOC need not consider.[5] As noted, however, we must presume that the legislature had some purpose and objective when it mandated that DOC require offenders to submit a plan as part of DOC's program and required that such proposals are to be reviewed by DOC in determining whether to "deny transfer to community custody status in lieu of earned release time." RCW 9.94A.728(2)(d).

The majority holds that DOC's rejection of Mattson's release plan was in accord with RCW 9.94A.728(2) because its reason was "'legitimate.'" Majority at 12 (quoting *Carver v. Lehman*, 558 F.3d 869, 877 (9th Cir. 2009) (in which that court said, "Washington courts have implied only one limit on the substance of the DOC's exercise of discretion: its reasons for denial must be 'legitimate.'")). Although I do not disagree with the proposition that DOC's basis for rejecting a release plan must be legitimate, it is apparent to me that DOC's reason for denying Mattson's plan was illegitimate in that it was not based upon a review of the merits of Mattson's plan.

Finally, I recognize that an offender identified by a DOC psychiatrist as meeting the definition of a sexually violent predator may ultimately have his release plan

[5]This is demonstrated by DOC's arguments that suggest there was no reason for it to consider a plan submitted by Mattson. *See* Resp. of DOC at 4 ("No community release plan will be safe enough for an offender like Mr. Mattson."); Resp. to Pet'r's Suppl. Br. at 5 ("The chances of Mr. Mattson obtaining a release address in the community that will be secure enough to prevent him from engaging in predatory acts of sexual violence are non-existent.").

rejected.[6] Nevertheless, RCW 9.94A.728(2)(d) does not permit DOC to substitute a psychiatrist's conclusion for one that DOC is to reach based on review of a release plan. DOC's citation to its own policy directive does not avail it. In my judgment, DOC violated the above cited statute when it denied Mattson's sixth release plan based not on a review of the plan, but instead on a policy directive that contravened DOC's statutory obligation. For these reasons, I would affirm the Court of Appeals' decision granting Mattson's PRP.[7]

[6]As the majority notes, Mattson's plan was later reviewed and rejected by DOC following the decision of the Court of Appeals. Majority at 2, 4 n.5. That action by the DOC is not before us, as our review is limited to the Court of Appeals' decision granting Mattson's PRP.

[7]I would resolve this case without reaching the liberty interest question. Nevertheless, I briefly mention it here to express my disagreement with the holding of the majority that RCW 9.94A.728(2) "cannot establish a liberty interest." Majority at 9. To the contrary, I believe that under the canon of statutory construction expressio unius est exclusio alterius—express mention of one implies exclusion of all others—subsection (2)(d) establishes a liberty interest because it creates a presumption in favor of transfer to community custody status for eligible offenders who propose a release plan and limits the discretion of DOC to deny transfer. *See In re Pers. Restraint of McCarthy*, 161 Wn.2d 234, 241, 164 P.3d 1283 (2007) (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979)); *see also Carver*, 558 F.3d at 875 n.11 (quoting *Bd. of Pardons v. Allen*, 482 U.S. 369, 378, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987)). My view relies in part on our recent decision in *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008), where we applied the canon to a statute using "if" and "may" in a similar manner and effect as subsection (2)(d).

AUTHOR:

Chief Justice Gerry L. Alexander

WE CONCUR:

Justice Richard B. Sanders

Justice Tom Chambers